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LETTER DATED 27 OCTOBER 1995 FROM THE PRESIDENT OF THE GOVERNING COUNCIL OF THE UNITED NATIONS COMPENSATION COMMISSION ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

I have the honour to transmit herewith through you, for the information of the Security Council, the following details concerning the eighteenth regular session of the Governing Council of the United Nations Compensation Commission, held at the Palais des Nations in Geneva, from 9 to 11 October 1995.

At its 54th meeting, the Governing Council heard statements from the representatives of Kuwait, Iraq, the Sudan and India, which are not members of the Council. It also heard the report of the Executive Secretary on the activities of the Commission (S/AC.26/1995/R.28).

At its 55th meeting, the Council considered and approved the recommendations made by the Panel of Commissioners concerning the fourth instalment of individual claims for departure from Iraq and Kuwait (category A claims). The fourth instalment includes 217,513 claims submitted by 67 countries and three international organizations filing Palestinian claims, totalling US$ 771,513,000, which brings the total of awards issued in that category to over 560,000 claims, for a value of over US$ 2 billion (for the text of the corresponding decision and report (S/AC.26/Dec.31 (1995) and S/AC.26/1995/4) see annexes I and II).

The Council also examined the tenth report of the Executive Secretary concerning consolidated claims in category E submitted after the expiration of the filing period deadline, in conformity with article 12, paragraph 2 of the provisional rules for claim procedures (S/AC.26/1995/R.26).

With regard to claims in categories A, B, C and D submitted after the expiration of the deadline for the filing of such claims that are affected by decision 23, i.e., those submitted after 1 January 1995, the Council examined the second report of the Executive Secretary (S/AC.26/1995/R.27 and Add.1) and accepted 3,087 claims for which the explanations offered by the Governments and international organizations met the conditions set by the Council. Another 1,349 claims were held over for further examination, while 130 were not accepted.

In discussing the agenda item on the processing and payment of claims, the Secretariat provided information on the work of the Panel of Commissioners considering the Kuwait Oil Company's well-blowout control claim. The Council discussed several procedural measures to facilitate the submission of additional information and views by the parties and to speed up the processing of claims. Other measures were adopted by the Council to reduce costs, among them being the reduction of the duration of the Council's sessions and further economies in the translation of documents.

With regard to the consolidated Egyptian claim on behalf of Egyptians working in Iraq, the Council received the report and recommendations of the Panel of Commissioners dealing with the jurisdictional phase of this claim. While awaiting the final report of the Panel, the Council requested the Executive Secretary to provide the text of the report to the Government of Egypt and the Government of Iraq.

The Governing Council decided to pay the value of the outstanding compensation awards issued in the first and second parts of the second instalment of category B claims (death and serious personal injury) totalling US$ 8.2 million to claimants from 41 countries and three international organizations filing Palestinian claims. This amount is in addition to the US$ 2.7 million already paid for the first instalment of claims in this category to claimants from 16 countries in June 1994 (S/AC.26/Dec.32 (1995)) (see annex III).

The Council considered the question of additional sources of funding, in conjunction with the letter addressed by the President of the Governing Council to the Chairman of the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait, requesting information on the confiscated Iraqi oil illegally carried by ships seized in the Persian Gulf that, according to the relevant Security Council provisions, should be sold with its proceeds to go to the Escrow Account, with 30 per cent to be transferred to the Compensation Fund. Also in this context, the Council renewed its appeal to all Governments to make serious efforts to locate and transfer the proceeds from the sale of Iraqi oil and petroleum products that had been exported but not paid for at the time of the adoption of Security Council resolution 661 (1990), as required by Security Council resolution 778 (1992).

It was agreed that the next regular session of the Council would be held from 11 to 13 December 1995.

I would like to avail myself of this opportunity to reconvey to you my concern, as well as that of the members of the Governing Council, over the serious negative repercussions that the lack of resources to pay outstanding compensation awards entails for the very credibility of the Compensation Commission and eventually for the whole United Nations system. The Governing Council looks forward to the Security Council for finding appropriate and

expedited solutions to ensure that the increasing number of issued compensation awards is to be honoured.

(Signed) Giuseppe BALDOCCI
President
Governing Council
United Nations Compensation Commission

Annex I

[Original: English]

Decision concerning the fourth instalment of claims for departure from Iraq or Kuwait (category A claims) taken by the Governing Council of the United Nations Compensation Commission at its 55th meeting held on 11 October 1995 at Geneva*

The Governing Council,

Having received, in accordance with article 37 of the Provisional Rules for Claims Procedure, the fourth report of the Panel of Commissioners appointed to review individual claims for departure from Iraq or Kuwait (category "A" claims), covering 217,513 individual claims,1/

1. Approves the recommendations made by the Panel of Commissioners, and, accordingly,

2. Decides, pursuant to Article 40 of the Rules and subject to paragraph 4 below, to approve the amounts of the recommended awards concerning the 217,513 claims covered in the annex to the report, as follows:

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* Previously issued as document S/AC.26/Dec.31 (1995).

1/ The text of the report is attached hereto (document S/AC.26/1995/4). In conformity with the provisions on confidentiality in the Provisional Rules for Claims Procedure (articles 30, paragraph 1, and 40, paragraph 5), a table containing the breakdown of the amounts to be paid to each individual claimant will not be made public, but will be provided to each respective Government and international organization separately.

Country	Number of Claims Recommended for Payment	Amount of Compensation Recommended (US$)
Algeria	4	26,500.00
Australia	16	85,500.00
Bahrain	6	22,000.00
Bangladesh	13,544	52,767,500.00
Benin	1	8,000.00
Bosnia and Herzegovina	883	3,553,000.00
Brazil	1	4,000.00
Bulgaria	418	1,817,000.00
Canada	93	434,500.00
Chad	1	5,000.00
China	1,424	5,694,500.00
Croatia	8	30,500.00
Cyprus	1	2,500.00
Czech and Slovak Federal Republic[2]/	105	438,000.00
Denmark	2	6,500.00
Egypt	75,577	207,373,000.00
Ethiopia	56	171,500.00
Federal Republic of Yugoslavia (Serbia and Montenegro)	902	3,761,000.00
Finland	5	16,500.00
France	31	154,500.00

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[2]/ These claims were submitted before the Czech and Slovak Federal Republic ceased to exist. Awards of compensation will have to be paid to the Governments of the Czech Republic and the Slovak Republic, respectively, pursuant to an agreement between the two Governments.

Country	Number of Claims Recommended for Payment	Amount of Compensation Recommended(US$)
Ghana	3	12,000.00
Germany	11	44,000.00
Greece	6	22,500.00
Hungary	22	114,000.00
Iceland	1	5,000.00
India	37,507	145,209,500.00
Iran	709	4,270,000.00
Ireland	36	129,500.00
Italy	54	181,500.00
Japan	187	827,000.00
Jordan	3,845	17,708,500.00
Kenya	2	7,500.00
Korea, Republic of	403	1,208,500.00
Kuwait	8,317	41,002,500.00
Lebanon	1,566	3,916,500.00
Malaysia	2	5,000.00
Mauritius	1	2,500.00
Morocco	32	135,500.00
Nepal	71	284,000.00
Netherlands	6	37,000.00
New Zealand	1	5,000.00
Nigeria	1	2,500.00
Norway	1	8,000.00
Pakistan	5,979	22,829,000.00
Philippines	7,778	30,684,500.00
Poland	915	3,788,500.00

Country	Number of Claims Recommended for Payment	Amount of Compensation Recommended(US$)
Romania	1,354	3,457,000.00
Russian Federation	2,022	8,968,000.00
Senegal	4	17,500.00
Slovenia	1	4,000.00
Somalia	144	509,000.00
Spain	1	5,000.00
Sri Lanka	18,155	71,994,500.00
Sudan	10,196	39,814,500.00
Sweden	10	38,000.00
Switzerland	1	8,000.00
Syria	7,492	26,360,000.00
The former Yugoslav Republic of Macedonia	239	964,000.00
Tanzania	13	68,000.00
Thailand	2,652	10,565,000.00
Tunisia	92	317,500.00
Turkey	1,805	6,306,000.00
Ukraine	2	8,000.00
United Kingdom	368	1,379,500.00
United States	178	836,000.00
Vietnam	6,209	24,834,500.00
Yemen	5,859	25,572,500.00
UNDP (Jerusalem)	15	78,000.00
UNDP (United Arab Emirates)	1	2,500.00
UNDP (Washington)	12	53,000.00
UNDP (Yemen)	3	10,500.00

Country	Number of Claims Recommended for Payment	Amount of Compensation Recommended(US$)
UNHCR (Bulgaria)	1	5,000.00
UNHCR (Canada)	12	49,500.00
UNHCR (Geneva)	6	28,000.00
UNRWA (Vienna)	132	466,500.00
Total	217,513	771,531,000.00

3. Reaffirms that when funds become available payments shall be made in accordance with Decision 17 [S/AC.26/Dec.17 (1994)],

4. Notes that where claimants, awarded the higher amounts available under Category "A", are found also to have filed claims in other categories, their awards will be adjusted in accordance with the provisions of Decision 21 [S/AC.26/Dec. 21 (1994)],

5. Recalls that, when payments are made in accordance with Decision 17 and pursuant to the terms of Decision 18 [S/AC.26/Dec.18 (1994)], Governments and appropriate authorities concerned shall distribute amounts received in respect of approved awards within six months of receiving payment, and shall, not later than three months after the expiration of this time limit, provide information on such distribution,

6. Requests that the Executive Secretary provide copies of the report and the annex to the report to the Secretary-General and copies of the report and the annex as well as the tables containing the breakdown of the amounts to be paid to each individual claimant to each respective Government and international organization, and reminds these Governments and international organizations of their obligation to take the appropriate measures to preserve the confidentiality of those tables.

Annex II

REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE FOURTH INSTALMENT OF CLAIMS FOR DEPARTURE FROM IRAQ OR KUWAIT (CATEGORY A CLAIMS)*

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* Previously issued as document S/AC.26/1995/4.

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INTRODUCTION

1. This report contains the recommendations to the Governing Council of the Panel of Commissioners (the "Panel") appointed to review claims for departure from Iraq or Kuwait ("category 'A' claims") pursuant to article 37(e) of the Provisional Rules for Claims Procedure (the "Rules"),[1] concerning the fourth instalment of claims[2] submitted to the Panel by the Executive Secretary of the United Nations Compensation Commission (the "Commission"). Category "A" claims are among the "most urgent claims" for which the Governing Council's Decision on "Criteria for Expedited Processing of Urgent Claims"[3] has set forth "simple and expedited procedures" in order to provide "prompt compensation in full" or "substantial interim relief".

2. The expedited procedures prescribed by article 37(a) of the Rules envisaged that in the initial phase the secretariat would check individual claims by matching them, insofar as possible, against the information in its computerized database, and that the results of the database analysis may be cross-checked by the Panel. The next processing phase relates to claims that could not be verified through the computer database. Article 37(b) of the Rules provides that, if the volume of these claims is large, the Panel may check individual claims on the basis of sampling with further verification as circumstances warrant.

3. The first three reports issued by the Panel made recommendations with respect to nearly 350,000 category "A" claims out of a total of more than 900,000 such claims registered with the Commission. The recommendations for the first three instalments of category "A" claims were made on the basis of verification by matching against information in the computerized database with regard to countries with a large volume of claims and, in a few instances, assessing information provided with the claim forms with regard to some countries with small numbers of claims. After resolving close to 350,000 category "A" claims through matching, the Panel commenced the second phase of verification on the basis of sampling, as envisaged by article 37(b) of the Rules.

4. In undertaking verification by sampling, the Panel was mindful of article 31 of the Rules that prescribes that, in considering the claims, the Commissioners should apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners were to apply the relevant rules of international law. Before commencing verification by sampling, the Panel received advice from recognized experts on statistical procedures and in the use of statistics in adjudicatory processes, and in particular, in the processing of mass claims. The Panel also had before it the views expressed in published material extracted from the growing legal literature on this subject, as well as a comprehensive background memorandum prepared by the secretariat. The legal

principles and issues underlying the sampling methodology, and the status of this methodology under international law and various national jurisdictions, are discussed in Part III of this report and the sampling methodology as such is explained in Part IV.

5. The Panel held a preparatory meeting with the secretariat of the Commission on 14 to 17 March 1995 to discuss the methodology and procedures used by the secretariat in the processing of the fourth instalment of category "A" claims and to organize the work of its substantive sessions. The Panel thereafter held three substantive sessions to review claims in the fourth instalment on 29 to 31 May, 10 to 13 July and 30 August to 1 September 1995.

I. CATEGORY "A" CLAIMS IN GENERAL

6. Category "A" claims are claims for departure from Iraq or Kuwait during the period of 2 August 1990 to 2 March 1991. For a more detailed description of the nature of category "A" claims, the Claim Form "A" and the amounts that can be claimed under this category, reference is made to Part I of the first report.

II. EVIDENTIARY STANDARD APPLICABLE TO CATEGORY "A" CLAIMS

7. The evidentiary standard applicable to category "A" claims is stated in Decision 1 and more specifically in article 35(2)(a) of the Rules which reads:

> "For the payment of fixed amounts in the case of departures, claimants are required to provide simple documentation of the fact and date of departure from Iraq or Kuwait. Documentation of the actual amount of loss will not be required".

8. As is explained more fully in Part IV.E., infra, the Panel in order to verify the claims in the fourth instalment applied a sampling methodology which involved a detailed review of a sample of claims that was representative of the overall claims population of every submitting country or international organization.

III. METHODOLOGIES USED IN PROCESSING OF MASS CLAIMS AND ANALOGOUS SITUATIONS: COMPARATIVE ASPECTS

A. Introduction

9. The conceptual framework and the elements of the sampling methodology employed by the Panel derive from evolving principles and practice both under international and national jurisdictions. Faced with situations of mass claims and other situations where a large number of cases involving

common issues of law and fact arise, courts, tribunals and commissions have adopted methodologies, including that of sampling, recognizing that the traditional method of individualized adjudication if applied to such cases would not be appropriate as it would result in unacceptable delays and substantially increase the burden of costs for such claimants and more so for the respondents. The legal principle involved may be stated as follows: in situations involving mass claims or analogous situations raising common factual and legal issues, it is permissible in the interest of effective justice to apply methodologies and procedures which provide for an examination and determination of a representative sample of these claims. Statistical methods may be used to determine the size and composition of the sample claims and to apply the results of the review of the sample to the remaining claims. [4]

10. The use of statistics and sampling in adjudicatory processes has been evolving over a considerable period. While there are direct precedents for the use of such methods in the national legal systems of Canada and of the United States where the use of statistics in the adjudicatory process is becoming quite common, the legal principle, as formulated above, has formed the basis of numerous determinations under international and national jurisdictions.

B. Evolving principles and practice under international and national jurisdictions to deal with mass claims and analogous situations

1. International jurisdiction

11. In international legal practice, the sampling methodology applied by the Panel is not without precedent. Though the number of claims which are being dealt with by the Panel, over 500,000, is unprecedented, the principle enabling use of sampling methodologies and statistical methods has been applied in quite a number of cases by international courts, tribunals and commissions. The use of "illustrative" or "test cases" has become customary in adjudicatory processes as the following international examples would illustrate.

(a) Iran-United States Claims Tribunal

12. The Iran-United States Claims Tribunal was created and its jurisdiction established by the Claims Settlement Declaration signed in Algiers on 29 January 1981. [5] Article II of the Declaration excludes from the jurisdiction of the Tribunal claims arising from contracts including forum selection clauses conferring exclusive jurisdiction to the Iranian courts in the event of dispute. The jurisdictional sphere of the Tribunal being of great importance, the Tribunal needed to decide at an early stage which forum selection clauses would fall within Article II and therefore place the corresponding claims outside its jurisdiction. For that purpose

the Tribunal selected nine cases out of over 1,000 such cases filed in order to provide guidance for the adjudication of the non-selected cases. The nine cases selected contained 19 forum selection clauses that were deemed representative of all the forum selection clauses present in the cases before the Tribunal.[6]

(b) The European Commission and Court of Human Rights

13. The European Commission and Court of Human Rights have, in addition to individual cases, been faced with allegations of practices involving a large number of human rights violations. The Commission, the main fact-finding body in the system created by the European Convention on Human Rights, has in a number of cases resorted to the method of drawing conclusions on the basis of a detailed examination of representative cases.[7] An example is provided by the Commission's report of 10 July 1976 in the case of Cyprus v. Turkey. With respect to certain alleged breaches of the European Convention on Human Rights, the Commission restricted the taking of evidence to a hearing of a number of representative witnesses and heard eye-witnesses only concerning one specific incident. On the basis of the material relating to one incident, the Commission felt able to infer and to conclude that certain behaviour contrary to the Convention had taken place on a larger scale and was not confined only to that incident.[8]

14. A similar approach was applied by the Commission and approved also by the European Court of Human Rights in Ireland v. United Kingdom.[9] The Irish Government lodged an application with the Commission in which it claimed that the United Kingdom had, in its use of "special powers" in relation to Northern Ireland, contravened a number of articles in the European Convention on Human Rights. The Commission and the Court were, inter alia, asked to determine whether these special powers were used in such a way as to constitute a "practice" of ill-treatment contrary to the Convention. The Commission determined the facts especially through the detailed examination of sixteen "illustrative" cases that were selected by the Irish Government. The method applied by the Commission was approved and followed by the Court which concluded that the practice complained of had existed in certain respects.[10]

(c) United States-German Mixed Claims Commission

15. This Commission was established by agreement between the United States and Germany to adjudicate the property and contract claims of their nationals that arose out of the First World War. Between 1922 and 1939, the Commission disposed of 20,433 claims. Faced with such a large number of claims, the Commission had adopted a procedure that ensured fair and expedited resolution of the claims before it.

16. First, the Commission divided the claims into groups and adopted rules and principles that applied to each group. Then, the Commission took "Administrative Decisions" covering questions of liability, causation and damage assessment. Finally, the Commission issued its awards through the adjudication of representative claims within each of the consolidated case groups.

17. The approach adopted by this Commission was followed by a number of later commissions and tribunals: the Tripartite Claims Commission involving the United States, Austria and Hungary,[11] the Italy-United Kingdom Conciliation Commission and the Italy-United States Conciliation Commission, both after the Second World War.[12][13]

2. National jurisdictions

18. The increase in mass claims, over the past several decades, has presented many national legal systems with a difficult challenge, particularly in the United States where the frequency of tort litigation has expanded noticeably. The traditional method of individualized adjudication, where the case of every litigant is tried separately, could not meet that challenge. Courts facing thousands of claims arising out of similar factual situations and raising common legal issues had to develop novel techniques to ensure effective justice to claimants and respondents. Leaving a mass of claims to be resolved through the system of individualized adjudication resulted in claimants having to suffer unacceptable delays, and the burden of mounting costs was borne not only by the claimant but even more so by the respondent if he were to defend each case separately. These substantial disadvantages, unacceptable delays for the claimants and mounting costs for the claimants and respondents, that inevitably resulted from following the traditional method, prompted the development of new methodologies aimed to ensure expeditious and cost-effective justice for the parties involved in mass claims litigation. A few examples of innovative responses of some national legal systems are given below.[14]

(a) Canada

19. The province of Quebec had adopted legislation specifically providing for class actions in 1978.[15] The Superior Court of Quebec and the Canadian Federal Court had received, between 1981 and 1987, around 6,000 individual law-suits for material and health damages caused by the Government-subsidized use of urea formaldehyde foam (miuf) for house insulation. The Superior Court of Quebec decided to provide guidance for the adjudication of this mass of cases through a study of "test cases". The plaintiffs and defendants selected six cases which according to them were representative of the whole population of 6,000 cases. The Superior Court delivered precedent-setting judgements in these "test cases" that could be applied thereafter to the remaining cases as they came before the court.

The examination of these six cases "would allow the Court to decide on the main legal and factual issues involved in the miuf problem".[16]/

20. In 1992 the Ontario legislature passed the Class Proceedings Act, establishing the procedure for class proceedings which substantially increased the opportunities for litigants to bring such actions, by no longer making this conditional upon satisfying certain strict conditions which had been required by common law, but simply prescribing the presence of "common" issues of fact and law as prerequisites for permitting such actions. One of the key elements of the Class Proceedings Act is that it sanctioned the use of sampling and aggregation by the Ontario courts when dealing with class actions.[17]/

(b) United States

21. There is more case practice involving mass claims processing techniques and related legal literature in the United States than in any other national jurisdiction. Sampling and the combination of law and statistics in general have come to be an established feature of United States legal practice. For example, the "Reference Manual on Scientific Evidence" issued by the Federal Judicial Center contains an 80-page "Reference Guide On Statistics", which aims to assist judges in the management and application of statistical criteria.[18]/

22. Faced with major litigations involving mass claims, which could not be effectively disposed of under the traditional method of individualized adjudication, new methodologies were developed. The typical "mass claims" litigation involved large numbers of plaintiffs suing for the damages they suffered as a result of using or being exposed to a particular product manufactured by one or several companies. Two major litigations in this area related to the "Dalkon Shield" and to the asbestos industry.

(i) Dalkon Shield litigation

23. In this litigation, tens of thousands of plaintiffs sued the A.H. Robins company for alleged defects in the intrauterine device it manufactured ("Dalkon Shield").[19]/ The court eventually faced a total of around 200,000 individual claims and applied the sampling methodology in the determination of the total value of these claims. Upon completion of a database, for which data was gathered by the application of the sampling methodology adopted, a hearing was held in which the total value of the 200,000 claims and an estimated number of future claims was determined. The valuation process was based entirely on the information obtained from the sample claims.

(ii) Asbestos litigation

24. Since the 1970s, the United States judicial system has been flooded by thousands of claims arising from exposure over the past 50 years to the insulating product "asbestos".

25. The need for methodologies which could meet the challenge of thousands of actions resulting in repetitive trials which meant long delays and increasing burdens of costs, led to the development of the procedural innovation of the method of case aggregation applied by Chief Judge Parker of the Eastern District of Texas in the Case of Cimino v. Raymark Industries, Inc.[20] After the settlement or dismissal of 733 out of 3,031 cases identified as a class involving asbestos-related injuries, the court was left with 2,298 cases.

26. The court used a sampling methodology for assessment of damages. It decided to divide the 2,298 cases into five categories according to the injuries for which damages were being claimed, i.e., the types of diseases that the plaintiffs alleged were caused by exposure to asbestos. Secondly, a random sample of cases was chosen from each category so as to be representative of the overall population of cases in each category. Each sample claim was then submitted to a jury, and each sample plaintiff was awarded the amount of damages ordered by the jury. The awards given in the sample cases were then extrapolated to the remaining cases within each category. This extrapolation was achieved through calculating the average amount awarded by the jury for the sample claims within each category and then awarding this amount, within the category, to each non-sample case.[21]

27. The gravity of the problem reached such proportions that in 1990 the Chief Justice of the U.S. Supreme Court appointed an ad hoc Committee on Asbestos Litigation. The objective of this Committee was to consider methodologies that could provide a reasonable solution to the overwhelming number of asbestos cases with which the judicial system had to deal. In 1991 this Committee released its report stating that in its view the traditional system of individualized adjudication, and other traditional methods used so far, have failed to provide a timely and fair solution to the huge backlog of asbestos cases. Therefore, the Committee recommended that a new procedure, that of "case applications" or "collective trials", be adopted to deal with mass claims situations. This procedure can be summarized as follows: a court facing a large number of asbestos cases would select a representative sample of these cases, try the sample cases and then extrapolate the results from the sample cases to the remaining non-sample cases, without resorting to individualized trials of these latter cases.[22]

28. The methodologies applied for the adjudication of the Dalkon Shield and asbestos cases show that sampling has been imaginatively applied to deal with situations of mass claims, which could not be effectively disposed of by the traditional method of individualized adjudication.

(c) United Kingdom

29. The British legal system faced in the 1980s a large number of law-suits arising out of the use of the drug benoxaprofen, commercially known as "Opren". By 1986 there were about 1,500 plaintiffs who had brought actions claiming damages for personal injury arising out of their treatment with Opren against the manufacturers of the drug and others. Even though the British procedural rules did not provide a sufficient basis for class action proceedings, the British court system responded creatively.

30. The following innovative procedure was adopted in the Opren case: one judge was appointed to adjudicate on all the interlocutory applications that were necessary before the claims could be individually tried. Bringing all these applications under the jurisdiction of one judge was deemed necessary because these applications raised many legal and factual issues that were common either to all plaintiffs or to many. This commonality of issues led the appointed judge to select "lead actions" raising common issues. The appointed judge then examined and determined these "lead actions" so that the common issues raised by these cases would be settled for the benefit of all cases and so as to give guidance on the adjudication of the non-lead actions. In one lead action, Davies v. Eli Lilly & Co., [23]/ the appointed judge gave an order to the effect that the costs incurred by a particular plaintiff in the pursuit of a "lead action" should be shared equally by all the plaintiffs in the Opren litigation. [24]/ This order was appealed; the Court of Appeal not only upheld the appointed judge's order, but also congratulated him on "producing a very fair and workable order in a novel and highly complex situation". [25]/

(d) Australia

31. Most Australian jurisdictions have procedures that provide for actions similar to the American and Canadian class actions, but, in Australia, they are referred to as "representative actions". These procedures also provide for the institution of "test cases"; "in some cases where multiple persons have commenced proceedings against a respondent in common circumstances, the parties may select one or more of the claims to be run as a test case". [26]/

C. Conclusion

32. The above review of the law and practice under international and national jurisdictions shows the growing acceptance and application of the principle of adjudication on the basis of sampling and test cases in situations involving a large number of cases or claims raising common issues of law or fact. This has been prompted by the realization of the inappropriateness of the traditional method of individualized adjudication in the case of mass claims and analogous situations.

33. The Governing Council, noting the large number of claims and the need to accord priority to claimants in certain categories, namely categories "A", "B" and "C", had directed that "simple and expedited procedures" be adopted (Decision 1). The Rules expressed this concern by requiring that the work of the Panels be organized "so as to ensure the expeditious processing of these claims and the consistent application of the relevant criteria and [the] Rules" (article 29), and by prescribing that the expedited procedures laid down by article 37 be followed with respect to claims received under Decision 1.

34. The Panel, in compliance with its mandate and the Rules, adopted first the matching methodology and then proceeded to apply the sampling methodology described in detail in Part IV., infra, enabling it to accomplish the verification of around 500,000 claims in a period of less than one year.

IV. THE PROCESSING OF THE FOURTH INSTALMENT OF CLAIMS

A. The composition of the fourth instalment of category "A" claims

35. In determining the total number of claims and the country-wise composition that would comprise the fourth instalment of category "A" claims the Panel applied the provisions of article 37(b) set forth by the Governing Council for the composition of the several instalments of category "A" claims, taking into account various considerations such as the total number of claims submitted by different countries, the dates of their submission, the estimate of time that it would take to process the claims even through expedited procedures and the estimate of the funds that might be available. In addition, the Panel took into consideration the suggestion made by the Governing Council at its seventeenth session to the effect that the fourth and fifth instalments of category "A" claims should be submitted to the Council for approval at its October and December 1995 meetings, respectively. The Panel's recommendations as set out in Part V, infra, for the payment of claims listed in the Summary Table attached to this report, are made according to such criteria and procedures, as elaborated below.

36. In general terms, the sampling results as determined by the Panel were applied, on a country-by-country basis, to all of the claims that had not yet been recommended for payment in the first, second or third instalments. However, certain claims for which further review was deemed necessary, have not been included in this instalment and will be considered when the final instalment of category "A" claims is processed (see paras. 82 and 83, infra). Also excluded from this instalment were claims identified as "possible duplicates" that, after further review, will be considered when the final instalment is processed (see para. 41, infra).

37. As a result of the foregoing, the claims included in the fourth instalment correspond to approximately 50 per cent of all of the claims that

have been verified by the Panel through sampling. The remaining 50 per cent of the verified sample claims will make up the fifth instalment of category "A" claims that will be reported to the Governing Council at its December 1995 session.

38. The number of claims per submitting country or international organization that the Panel has recommended for payment in this instalment is listed in the column "Number of Claims Recommended for Payment" of the Summary Table attached to this report.

B. Processing by the secretariat

39. All of the claims contained in the fourth instalment were subjected to the processes described in Part IV.A. of the first report.

C. Validation

40. As was the case for the claims contained in the first three instalments of category "A" claims, the claims in the fourth instalment were passed through a preliminary computerized screening process hereinafter referred to as "validation", before the extrapolation determinations made by the Panel on the basis of the sampling methodology were applied to the claims. The purpose of the validation procedure was threefold. First, the claims were checked to determine whether the proper format had been used. Second, the Iraqi claimants were separated from the non-Iraqi claimants. Third, the validation programme checked whether there were any possible duplicate category "A" claims.

41. As explained more fully in Part IV.B.3. of the first report, the Panel instructed the secretariat to analyze further the claims that had been identified and separated as "possible duplicates" to confirm whether such claims were indeed duplicates. The secretariat will re-examine such claims in conjunction with the consideration of the final instalment. In view of the considerations that were outlined in the first report, the Panel recommends that governments keep an accurate record of the persons to whom amounts awarded are paid in order to minimize the risk of multiple recovery.

D. Other issues

1. Limitations on claiming in more than one category

42. The Governing Council's Decision 21 on "Multi-Category Claims"[27] establishes that claimants who have selected a higher amount under category "A" (US$4,000 or US$8,000) and have also filed a claim in category "B", "C" or "D", will be deemed to have selected the corresponding lower amount under category "A". With regard to this decision, the Panel in its second and third reports (Part IV.C.2.) had drawn the attention of the Governing Council to the prejudice caused by that decision to the claimants who had

submitted category "A" claims and had abided by the rules that required them to agree not to file claims in another category. The Panel had expressed the view that the Governing Council may wish to review this matter, and had indicated the lines along which a fair solution could be achieved by an appropriate decision of the Governing Council that would maintain "a just balance between such claimants and those who will benefit from the application of Decision 21".

43. The Panel noted that when approving the second report, the Governing Council, at its sixteenth session, inter alia, had stressed that it shared the Panel's concern that no claimant who properly followed the Commission's procedures in submitting a category "A" claim should be prejudiced as a result of the application of Decision 21. The Governing Council had decided to keep under advisement, and at an appropriate time consider, whether the Commission's procedures for making payments to successful claimants should be implemented as proposed by the Panel, i.e., that all successful claimants who had submitted category "A" claims for higher amounts but had not submitted claims in any other category, receive full payment of those amounts, pursuant to the terms of Decision 17, before any additional amounts beyond the initial US$2,500 are paid to the category "A" claimants who submitted claims for such higher amounts but had also filed claims in other categories. The Panel also noted that, in considering this matter, the Governing Council would take into account the views of the secretariat regarding this proposal's feasibility and implications.

2. Interest

44. On the basis of the considerations formulated in Part IV.C.3. of the first report, the Panel reiterates its recommendation that interest should be paid on the awarded amounts in category "A" claims in accordance with the Governing Council Decision on "Awards of Interest".[28]/ The Panel reiterates its opinion that the phrase "the date the loss occurred" in Decision 16 should be interpreted to be a single date for all category "A" claims and that the date of invasion, 2 August 1990, should serve as the fixed date.

E. Verification of claims in the fourth instalment using sampling

45. As stated, sampling was the methodology used for the verification of the claims contained in the fourth instalment. In accordance with Decision 1, the purpose of the sampling exercise was to determine whether the evidence attached to the sample claims proved departure from Iraq or Kuwait within the period falling between 2 August 1990 and 2 March 1991, and thereby to determine eligibility for compensation. Relying on expert advice and taking into consideration the various methodologies used for conducting sampling exercises, the Panel's sampling methodology consisted of three stages. Firstly, the sample was designed so as to be representative of the overall claims population of each country or international organization

concerned. Secondly, the chosen sample was reviewed in accordance with the stated purpose of the sampling exercise. Thirdly, the results of the sample review were applied or "extrapolated" to the population of claims from which the sample was drawn.

1. Stage one: designing the sample

46. Since determining the appropriate sample is a statistical exercise, professional statisticians were consulted for the purpose of calculating the size and defining the composition of the samples. In light of the lack of homogeneity among the claims submissions from and the processing used by the various submitting countries and international organizations it was decided that the sampling operation should be country-specific (rather than across all category "A" claims) so as to increase the homogeneity of the population from which the samples were to be chosen, and thereby to improve the results of the extrapolation.[29]/

(a) General considerations

47. Two general considerations contributed to the determination of the size and composition of the samples chosen for the countries or international organizations that had submitted category "A" claims. Firstly, since the results of the sample review were to be used to determine who was eligible for compensation in the overall population of claims per country or international organization, it was essential that the sample be representative of this population, i.e., before making any extrapolation judgement the Panel had to satisfy itself that the sample claims constituted a sufficiently accurate reflection of all of the claims submitted by the concerned country or international organization. Secondly, the efficiency and the manageability of the sampling operation had to be taken into account. The Governing Council has mandated expeditious relief for category "A" claimants, and hence the sample sizes had to be such that the sampling review could be completed efficiently and within a reasonable timeframe. In short, the samples chosen had to be representative so as to produce sufficiently accurate results overall and had to be manageable in size so as to be reviewed expeditiously.

(b) Variables determining the sample size

48. The three principal variables determining the size of a sample in a simple random sampling exercise are (i) the estimated proportion of sample units satisfying the sampling criteria; (ii) the chosen margin of error; and (iii) the desired level of confidence.[30]/

(i) Prominent proportion of evidence

49. In the present context, a key variable contributing to the determination of the size of a sample was the prominent proportion of evidence. The prominent proportion is determined from the percentages of the types of evidence[31] submitted and serves as an estimate of the heterogeneity of the types of evidence in the population of claims from a particular country or international organization. In sampling, the higher the degree of heterogeneity in the population, the larger must be the sample size to maximize the likelihood that the sample is representative of the population.[32]

50. In view of the foregoing, to ascertain the appropriate prominent proportion for determining the size of the sample for a particular country or international organization's claims, the information contained in the Commission's category "A" claims database was used to obtain the percentages of the distribution of the types of evidence. Where these data indicated a high degree of heterogeneity, i.e., where the percentage for at least one type of evidence was or approximated 50 per cent, the prominent proportion used was such that the probability that the evidence item in question was represented in the sample was maximized. For example, if the data showed that 90 per cent of the claims from a particular country have "Visa/Passport Stamp", 26 per cent have "Used Tickets", and 40 per cent have "Statement", the sample size was determined on the basis of the 40 per cent proportion (this being the closest to 50 per cent). In this way, not only would the 26 per cent proportion of "Used Tickets" be reflected in the sample, but so also would the "Visa/Passport Stamp" proportion of 90 per cent.

(ii) Margin of error

51. Stated simply, the margin of error is the amount of acceptable variation with respect to the results obtained from the sample review. It is typically expressed as a numerical range (e.g., plus or minus 5 per cent) around the proportion of claims in the sample satisfying the sampling criteria. For example, for a sample where a 5 per cent margin of error has been used, if 90 per cent of the sample claims are found to have provided "Visa/Passport Stamp", it may be concluded that the percentage of all claims from that country providing "Visa/Passport Stamp" is between 85 and 95 per cent, for a given level of confidence.

52. Generally, the chosen margin of error affects the size of the sample. For a given level of confidence, generally the smaller the margin of error the larger must be the sample size. Similarly, for a given level of confidence, the higher the margin of error the smaller the sample size may be.

53. In determining the size of the category "A" claims samples, a margin of error of plus or minus 5 per cent was applied. This is a standard margin used in a variety of statistical estimation exercises and is generally accepted as yielding sufficiently accurate results. It also takes into account the need to hedge against errors possibly arising from differences

in the processing of the claims by the Commission and by the submitting country or international organization.

(iii) Confidence level

54. Any margin of error is associated with a level of confidence, in other words, the probability that the proportion of claims in the sample satisfying the relevant criteria will be replicated in the population of claims. There is a tradeoff between the confidence level and the size of the margin of error. Thus, to obtain a higher level of confidence for the same sample size, the user must be willing to accept a higher margin of error, or increase the size of the sample; the smaller the margin of error and the higher the desired level of confidence, the bigger the sample size must be.

55. A standard textbook in statistics, that was relied upon by the Panel, refers to the confidence level as being "most often 90 per cent or higher". [33]/ The most commonly used confidence level in statistics is "19 times out of 20", i.e., there is a 95 per cent probability that for a chosen margin of error the sample drawn is representative and a 5 per cent chance that it is not. Accordingly, for purposes of the sampling of category "A" claims, the most standard confidence level, i.e., 95 per cent, was applied.

56. Once the prominent proportion of evidence was determined and the margin of error chosen, the sample size was calculated for a 95 per cent confidence level that the sample was representative of the overall claims population for any given country. It was thus established that there was a 95 per cent probability that the selected sample would be representative within a 5 per cent margin of error. So composed, with a 95 per cent confidence level and a 5 per cent margin of error, the samples determined for the various countries and international organizations that have submitted category "A" claims thus conformed to conventional practice in statistics involving the use of a standard formula. [34]/

57. Where the percentages for the distribution of evidence for the overall population of a country's claimants corresponded accurately to those for the distribution of evidence in the sample, the "1 chance in 20" risk was no longer applicable.

58. On the other hand, where the comparison showed that the percentages for the distribution of evidence in the database and in the sample did not coincide, then there was "1 chance in 20" of the sample not being representative within a margin of plus or minus 5 per cent. However, the method used to choose the sample, a random computerized selection of the claims in the database, ensured that all the samples selected were sufficiently representative for extrapolation purposes.

(c) Identifying sample claims

59. Randomness in the selection of the sample claims ensured that the chosen samples were sufficiently representative of the overall population. Claims so selected thus reflected all the different kinds of claims and evidence attached thereto, i.e., the samples drawn did not concentrate on one group of claimants or the other but were a reflection of all of the different groups in the overall population. Therefore, upon determining the sample size for each country and international organization, the actual sample claims per country or international organization were identified by using a computerized random number generator and by identifying the corresponding claims through their UNCC and National Reference Numbers in the claims database. Letters were then sent requesting each government and organization to submit to the Commission the paper claim forms and attached evidence for the specified claims. As of the date of this report, the secretariat has received the requested sample paper claim forms from all the countries and international organizations whose claims have been included in the fourth instalment.

60. In conclusion, the representativeness of the sample was the overriding factor in determining the size and composition of the sample of category "A" claims for each country and international organization. The results of the review of a sample could only be extrapolated to the remainder of the claims once the samples were determined to be sufficiently representative of the population in respect of the types of evidence submitted. The second factor that had to be taken into account in determining the sample sizes and compositions was the mandate to review the claims expeditiously. Accordingly, samples were selected using margins of error and confidence levels that are commonly used in statistical practice to ensure sufficient representativeness, and which at the same time could be reviewed within the time frame mandated by the Governing Council.

2. Stage two: assessment of the sample claims

61. Governing Council Decision 1 established that compensation payments "are available with respect to any person who ... departed from Iraq or Kuwait during the period of 2 August 1990 to 2 March 1991" (para. 10). It further determined that "simple documentation of the fact and date of departure from Iraq or Kuwait" should be provided by claimants to be eligible for compensation.

62. Accordingly, the verification of category "A" claims on the basis of sampling involved the manual review of the evidence attached to each sample claim in order to ascertain whether the claimant departed from Iraq or Kuwait during the relevant jurisdictional period.

63. Claim Form "A", the contents and format of which were approved by the Governing Council at its third session in November 1991, lists the types of documents that the claimants could submit in support of their claim and provides tick boxes for every type.[5]/ The computerized category "A"

claims information in the secretariat's database provides knowledge as to all seven possible evidence types submitted in support of the claims.

64. The objective of including the list of seven evidence types and corresponding tick boxes in the claim form was twofold. Firstly, this was intended to assist government officials and claimants in understanding the meaning of "simple documentation of the fact and date of departure" so that evidence that is relevant to the fact and circumstances to be proved could be submitted. Secondly, providing a tick box next to each evidence type was intended to give the secretariat the actual knowledge of the percentages of types of evidence attached to the claims in the category "A" claims database, with a view to, inter alia, designing the verification process.

(a) Determinations on the evidentiary value of documentation attached to claims

(i) General determinations

65. There are several elements that have a bearing on the determination of the evidentiary value of the documentation attached to the claims.

66. On the basis of the legal criterion set out in Decision 1 for the assessment of category "A" claims, i.e., proof of departure from Iraq or Kuwait during the period of 2 August 1990 to 2 March 1991, a number of determinations regarding the evidentiary value of the Arrival/Departure Records was made by the Panel in the context of the matching process.[36]/ The general determinations that the Panel made on the probative value of evidence in the context of the sampling review were consistent with those made with respect to the Arrival/ Departure Records. Consequently, all claimants whose evidence showed circumstances of departure identical or similar to those of a particular Arrival/Departure Record were assessed to have evidence of the same probative value as these records.

67. Using these determinations as the basis for its assessment of the value of evidence attached to sample claims, the Panel further determined that for a claimant to prove departure from Iraq or Kuwait, the documentary evidence attached to the claim should show, during the jurisdictional period:

(1) exit from Iraq or Kuwait; or

(2) presence in Iraq or Kuwait in combination with

(a) presence in Jordan or another border country; or
(b) entry into or exit from any other country; or

(3) entry into or exit from Jordan or another border country.

68. The first and second determinations were arrived at through the application of the criterion established by the Governing Council in Decision 1, i.e., proof of departure from Iraq or Kuwait.

69. For the third determination the Panel relied in addition on departure information that led to the conclusion that documents showing exit from a border country during the jurisdictional period should be assigned the same evidentiary value as those showing departure from Iraq or Kuwait. While throughout the Gulf crisis Jordan was the main outlet for the evacuation of individuals fleeing Iraq's invasion and occupation of Kuwait, with an estimated 700,000 evacuees travelling through Jordanian territory, other border countries such as Saudi Arabia, Iran and Turkey also received considerable numbers of evacuees.

70. Furthermore, information from independent sources, such as the International Labour Organization (ILO) and the International Organization for Migration (IOM), that was collected by the secretariat in departure reports for the ten countries that collectively submitted over 80 per cent of all the category "A" claims filed with the Commission, shows that the total number of each of these countries' evacuees who are estimated to have departed through Jordan or other border countries was higher than the number of category "A" claimants from each of these countries.

71. Consequently, the Panel determined that, in the absence of evidence falling in categories 1 and 2 above, evidence of entry into or exit from Jordan or other border countries during the relevant period would suffice for a claimant to show departure from Iraq or Kuwait.

(b) Review and assessment of claims

(i) Assessment categories

72. Three assessment categories were adopted: conclusive, possible and insufficient.

73. Claims were assessed as "conclusive" if the evidence attached thereto clearly proved departure from Iraq or Kuwait within the jurisdictional period. Thus, claims were assessed as "conclusive" if the claimant submitted an item of evidence
that, in itself or in combination with another item, proved departure from Iraq or Kuwait during the relevant jurisdictional period.

74. Claims were initially assessed as "possible" where the evidence attached did not warrant its assessment as "conclusive", but could also not be categorized as "insufficient". In general terms, claims were classified under this category where only presence in Iraq or Kuwait, presence in Jordan or other border country or entry in or exit from a non-border country could be proved.

75. Finally, claims were classified as "insufficient" where there was no evidence attached whatsoever, or the only evidence manifestly disproved, or was irrelevant to the fact of, departure from Iraq or Kuwait within the jurisdictional period.

(ii) Specific determinations

76. In reviewing the sample claims of each country and international organization that were initially assessed as "possible", the Panel decided that such claims were to be assessed as "conclusive" only when any of the following evidentiary items were attached to a claim form:

- A personal statement asserting departure from Iraq or Kuwait within the jurisdictional period, by itself, if the route and circumstances of departure described therein fit in the departure pattern of nationals of the same country as the claimant's, as established by independent reliable sources;

- A personal statement asserting departure from Iraq or Kuwait within the jurisdictional period, combined with proof of presence in Iraq or Kuwait, or proof of entry into a third country, including the claimant's home country, both within the jurisdictional period. If the date of entry into a third country, including the claimant's home country, was outside the jurisdictional period, the "possible" claim was to be assessed as "conclusive" provided that this could be reasonably explained by relevant circumstances, such as travelling time;

- A personal statement asserting presence in Iraq or Kuwait within the jurisdictional period, combined with proof of entry into a third country also within the period;

- Proof of presence in Iraq or Kuwait within the jurisdictional period, by itself, in light of information available to the Panel from independent reliable sources and from the review of the sample concerning the circumstances of departure and departure patterns of nationals of the same country as that of the claimant;

- Proof of presence in Iraq or Kuwait within the jurisdictional period, combined with proof of entry into a third country, including the claimant's home country, outside the same period, provided that this could be reasonably explained by relevant circumstances, such as travelling time;

- By itself, proof of entry into a third country, including the claimant's home country, within the jurisdictional period, if the specific circumstances of entry fit in the departure pattern of nationals of the same country as the claimant's, as established by

independent reliable sources and from the patterns in the sample in question;

- By itself, a travel permit or an emergency passport issued within the jurisdictional period by the diplomatic mission of the claimant's country in Iraq or Kuwait to enable its nationals to depart.

77. In a number of cases where the information contained in the evidence attached to a claim did not show departure by itself, the Panel decided to assess the claim as "conclusive" only if the general information contained in the evidence attached to other claims from the same country showed that the circumstances of stay in, and departure from, Iraq or Kuwait (such as the name of the company employing the claimants, their working place, evacuation route, timing and means, etc.) were the same both in "conclusive" claims and in claims with this kind of evidence.

3. Stage three: application of the results of the sample review to the total population per country or international organization

78. In order to apply or extrapolate the results of the review of the sample to the overall population of claims submitted by a particular country or international organization, the secretariat used a "selective sampling" methodology. The term "selective sampling" describes a country-specific and evidence-specific methodology that involves the assessment of evidence attached to the sample from each country or international organization by type of evidence so as to extrapolate the conclusions from this assessment, by type, over the whole population of claims submitted by each country or international organization.

79. The conclusions of the review of all the sample claims from a particular country or international organization were recorded in a summary report. Based on this information, the Panel made the appropriate extrapolation judgements and identified options for the further review of claims not verified through the sampling methodology.

(a) Representativeness of the sample

80. The claims constituting the sample of each country or international organization were selected randomly through the computerized claims database. This randomness ensured that each sample was representative of the overall claims population of each country or international organization. Furthermore, where the distribution of types of evidence for all claimants from a particular country or international organization, as recorded in the database, corresponded to the distribution of the types of evidence ticked and/or actually attached to the sample claims, the Panel made an extrapolation judgement through types of evidence. However, where the percentages for the distribution of types of evidence in the sample and the overall population did not correspond, the possibility of evidence-specific

extrapolation was excluded and the Panel made a "general" extrapolation judgement, as explained in paragraph 84 below.

(b) Extrapolation

81. It was the percentage of "conclusive" claims within each type of evidence that formed the basis of the extrapolation. When the percentage of "conclusive" claims within a particular type of evidence was judged by the Panel to be sufficiently high, then the Panel recommended that all those claimants in the overall population of claims submitted by that country or international organization who submitted that particular type of evidence are entitled to be compensated.[37]/

82. If, to the contrary, the Panel determined that the percentage of "conclusive" claims within a particular type of evidence was not sufficiently high or established that a type of evidence existing in the claims database was not represented in the sample, the Panel decided to request the submitting government or organization to provide to the Commission, for further individual review, the paper claim forms and attached evidence of those claims which, according to the claims database, had submitted that particular type of evidence. The claims for which the claims database indicated that no evidence at all had been provided, are also requested from submitting governments and organizations for such review. In this way, claimants who, although having submitted evidence, did not tick the corresponding check-box on the claim form, or whose claims had been modified when being data-captured by the government or international organization, will not be prejudiced for such involuntary alterations since their claims will be given further consideration on a one-by-one basis.

83. The Panel decided that the paper claim forms and the attached evidence of those claims which, according to the claims database, listed a date of departure outside the period of 2 August 1990 to 2 March 1991, are also requested from submitting governments and international organizations for further individual review. The Panel decided to review these claims on a one-by-one basis because a pattern was established across countries and international organizations which showed that a substantial number of claims proved departure from Iraq or Kuwait within the jurisdictional period even though on their claim forms they had stated a date outside the period.

84. This kind of evidence-specific extrapolation could not be applied to samples in which the percentages of distribution of types of evidence did not coincide in the claims database and the sample. In such cases, the Panel decided that if the general percentage of "conclusive" evidence in the sample was sufficiently high, it could safely be concluded that such a percentage would also be reflected in the overall population of claims. Consequently, when the overall "conclusive" percentage was sufficiently high, the Panel concluded that all such claims should be recommended for payment, with the exception, if applicable, of those claims which, according

to the claims database, listed a date of departure outside the jurisdictional period or submitted no evidence at all.

85. Whether the percentage of "conclusive" within an evidence type or the general percentage of "conclusive" evidence in the sample was regarded as sufficiently high to recommend for compensation 100 per cent of those claimants who were recorded as having attached that type of evidence to their claim forms, or the overall population of claimants, respectively, depended on various factors and was a country-specific determination. The Panel had various resources available to it in making these determinations. Firstly, the Panel consulted the summary report produced for the sample of each country or international organization to get a better view of the quality of the evidence attached and the patterns identified within the sample.

86. Secondly, the Panel consulted the departure reports prepared by the secretariat that describe the socio-economic background and evacuation routes of the foreign worker communities in Iraq and Kuwait for the countries that have submitted the majority of the category "A" claims. Thirdly, where available, the Panel referred to legal briefs and other background information submitted by various governments describing their national claims programmes and particular characteristics relevant to their claimant communities. In the case of a country's sample, for example, where it became clear that the claimants had misunderstood certain terms on the claim form, such as "date of departure" or "boarding pass", these governmental submissions confirmed that there was such a misunderstanding and explained the reasons behind it.

87. Fourthly, the Panel referred to the matching results. As previously stated, almost 350,000 claims have previously been verified through matching and these results were taken into account in the verification by sampling. The matching results for a particular country or international organization were part of the background information that the Panel could rely upon when considering the results of the samples and their extrapolation to the remaining claims.

88. Sampling was thus not an exclusive methodology. Rather, it was conducted in the context of general background information, such as that found in departure reports, the submissions made with regard to national claims programmes, and the matching results.

V. RECOMMENDED COMPENSATION FOR THE FOURTH INSTALMENT OF CATEGORY "A" CLAIMS

89. Pursuant to article 37(e) of the Rules, the Panel hereby presents its final recommendations on the claims comprising the fourth instalment of category "A" claims.

90. Having considered the results of the verification of claims accomplished through sampling and further having considered all relevant circumstances and materials available with the Commission, the Panel recommends for payment of compensation 217,513 claims submitted by 67 countries and by the United Nations Development Programme (UNDP), the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). The total recommended amount of compensation for the fourth instalment comes to US$771,531,000.00.

91. The Panel records that claims that could not be included in the fourth instalment due to such factors as defective format or possible duplication are expected to receive consideration when the final instalment is processed. Also, claims that were decided to be reviewed individually will receive consideration when the final instalment is processed.

92. The attached Summary Table (see annex I above) lists on a country-by-country basis the number of claims for which payment is recommended and the total recommended amount of compensation. A table containing the breakdown of the amounts to be paid to each individual claimant will be provided to each respective country.

93. The Panel has taken note of the destitution and suffering endured by a great number of claimants, descriptions of which were contained in many of the personal statements attached to the sample claims reviewed by the Panel. The Panel urges that all efforts be made to find resources to effect the prompt payment of compensation approved by the Governing Council so as to provide meaningful relief as expeditiously as possible.

Geneva, 1 September 1995

(Signed) Kamal Hossain
Chairman

(Signed) Matti Pellonpää
Commissioner

(Signed) Rafael Rivas-Posada
Commissioner

Notes

1/ S/AC.26/1992/10. Article 37(e) requires that "[e]ach Panel will report in writing through the Executive Secretary to the Governing Council on the claims received and the amount recommended to be allocated to each Government or other entity for each consolidated claim. Each report will briefly explain the reasons for the recommendations and, to the extent practicable within the time-limit, contain a breakdown of the recommendations in respect of individual claims within each consolidated claim".

2/ The recommendations concerning the first instalment of claims are contained in the "Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Claims for Departure from Iraq or Kuwait (Category 'A' Claims)" (S/AC.26/1994/2) (hereinafter referred to as the "first report"). General information regarding the establishment of the United Nations Compensation Commission in the aftermath of the Gulf crisis as well as the composition of the Panel are contained in the introduction to the first report. The recommendations concerning the second instalment of claims are contained in the "Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of Claims for Departure from Iraq or Kuwait (Category 'A' Claims)" (S/AC.26/1995/2) (hereinafter referred to as the "second report"). The recommendations concerning the third instalment of claims are contained in the "Report and Recommendations Made by the Panel of Commissioners Concerning the Third Instalment of Claims for Departure from Iraq or Kuwait (Category 'A' Claims)" (S/AC.26/1995/3) (hereinafter referred to as the "third report").

3/ S/AC.26/1991/1 (hereinafter referred to as "Decision 1").

4/ See infra, Parts IV.E.1 and IV.E.3.

5/ Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, Iran-US Claims Tribunal Reports (1983), vol. 1, p. 9.

6/ See, e.g., Ted L. Stein, "Jurisprudence and Jurists' Prudence: The Iranian Forum Clause Decisions of the Iran-U.S. Claims Tribunal", American Journal of International Law (1984), vol. 78, p. 1 ; R. Håkan Berglin, "The Iranian Forum Clause Decisions of the Iran-United States Claims Tribunal", Texas International Law Journal (1985), vol. 21, p. 39.

7/ See Jochen A. Frowein, "Fact-Finding by the European Commission of Human Rights", Fact-Finding Before International Tribunals, Eleventh Sokol Colloquium, Richard B. Lillich ed. (Transnational Publishers Inc., New York 1992), p. 237, paras. 247-248.

8/ Application Nos. 6780/74 and 6950/75, Report of 10 July 1976, special publication of the Council of Europe, p. 119. The case ended with Resolution DH(79)1 adopted by the Committee of Ministers of the Council of Europe on 20 January 1979, according to which the events in Cyprus constituted violations of the Convention. See also Cyprus v. Turkey (Application No. 8007/77), Report of the Commission of 4 October 1983, European Commission of Human Rights, Decisions and Reports, vol. 72, p. 5, paras. 29-39 (conclusions

concerning an "indefinite number" of "missing persons" drawn on the basis of illustrative cases). See also ibid., p. 62 [Resolution DH(92) 12 of 2 April 1992 of the Committee of Ministers deciding to make public the report]. Unlike Ireland v. United Kingdom, the cases just mentioned did not go to the European Court of Human Rights, the respondent Government not having recognized the Court's jurisdiction at the relevant time.

9/ European Court of Human Rights, Judgement of 18 January 1978, Eur. Court H.R., Series A, vol. 25.

10/ See ibid., paras. 92-187.

11/ See the Final Report of Commissioner and Decisions and Opinions, Reports of International Arbitral Awards (RIAA), vol. 6, p. 209, where the Commissioner decided: "With respect to [a certain category of] claims the principles and rules announced in the decisions and opinions of the Umpire of the Mixed Claims Commission, United States and Germany, will, so far as applicable, govern".

12/ See, e.g., RIAA, vol. 14, p. 27.

13/ See also David J. Bederman, "Historic Analogues of the United Nations Compensation Commission", The United Nations Compensation Commission, Thirteenth Sokol Colloquium, Richard B. Lillich ed. (Transnational Publishers Inc., New York 1995), p. 257.

14/ Legislation making it possible to adopt a mass claims approach is being prepared also in certain countries not specifically dealt with below. Thus, in Finland a working group set up by the Ministry of Justice adopted in 1995 a proposal concerning a Group Action Act: Ehdotus ryhmäkannelaiksi (Proposal for a Group Action Act), Publication of the Legislative Department of the Ministry of Justice 1/1995. Also in Sweden a report by a law reform committee on the same subject matter was published recently: Grupprättegång (Group Action Proceedings), Statens offentliga utredningar (Official Reports of Swedish Legislative and Investigations Commissions) 1994:151 (vols. A, B and C).

15/ Gary D. Watson, "Ontario's New Class Proceedings Legislation: An Analysis", Guide to Case Management and Class Proceedings-Watson and McGowan Ontario Civil Practice (Ontario, Carswell Thomas Professional Publishing, 1994), p. 2.

16/ Claude Masse, "La Compensation des victimes de désastres collectifs au Québec", Windsor Yearbook of Access to Justice (1989), vol. 9, p. 10.

17/ Watson, op. cit., pp. 1-11.

18/ There is substantial United States legal literature related to sampling and mass claims processing techniques in general. See, e.g., the following articles: James F. Blumstein, Randall R. Bovbjerg and Frank A. Sloan, "Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury", Yale Journal on Regulation (1991), vol. 8, p. 171; Marc Galanter, "Bhopals, Past and Present: The Changing Legal Response to Mass Disaster", Windsor Yearbook of Access to Justice (1990), vol. 10, p.151; Earl Johnson, Jr., with Elizabeth Shwartz, "A Preliminary Analysis of Alternative Strategies for Processing Civil Disputes", National Institute of Law Enforcement and Criminal Justice (1978); Francis E. McGovern ed., "Claims

Resolution Facilities and the Mass Settlement of Mass Torts", Law and Contemporary Problems (1990), vol. 53, ; Francis E. McGovern, "The Intellectual Heritage of Claims Processing at the United Nations Compensation Commission", The United Nations Compensation Commission, Thirteenth Sokol Colloquium, Richard B. Lillich ed., (Transnational Publishers Inc., New York 1995); Francis E. McGovern, "An Analysis of Mass Torts for Judges", Texas Law Review (1995), vol. 73, p. 1821 ; Francis E. McGovern, "Looking to the Future of Mass Torts: A Comment on Schuck and Siciliano", Cornell Law Review (1995), vol. 80, p. 101.

[19]/ The background facts are derived from Hawkinson v. A.H. Robins, Federal Supplement (1984), vol. 595, p. 1290 and from Francis E. McGovern, "Resolving Mature Mass Tort Litigation", Boston Law Review (1989) vol. 65, p. 659.

[20]/ Federal Supplement, vol. 751, p. 649 (E.D. Tex. 1990). The facts of this case were also drawn from Michael J. Saks and Peter D. Blanck, "Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts", Stanford Law Review (1992), vol. 44, pp. 819-826.

[21]/ After Cimino, a similar sampling approach was adopted in the case of In re Shell Oil Refinery, Federal Rules Decisions (1991), vol. 136, p. 588.

[22]/ Saks and Blanck, op. cit., pp. 816-820.

[23]/ Weekly Law Reports 1987, vol. 1, p. 1136.

[24]/ It should be noted that this order was only made possible by the decision of the House of Lords in the same year in the case of Aiden Shipping Co. Ltd. v. Interbulk Ltd. ([1986] A.C. 965) in which the courts were given a very wide discretion in determining who is liable for the costs incurred in proceedings.

[25]/ Ibid., p. 1143.

[26]/ John Griffiths, "Class Actions in Administrative Law- An Australian Perspective", International Legal Practitioner (June 1990), p. 53.

[27]/ S/AC.26/Dec.21 (1994) (hereinafter referred to as "Decision 21").

[28]/ S/AC.26/1992/16 (hereinafter referred to as "Decision 16").

[29]/ A sample was selected for each of the countries and international organizations that have submitted over 100 claims. However, it was deemed unnecessary to select samples for those countries and organizations that submitted less than 100 claims. In the latter cases, all the claims submitted by the particular country or organization were reviewed individually. However, the review of these claims was conducted in accordance with the same criteria and considerations applied in the sampling of the claims of the countries and organizations that submitted over 100 claims.

[30]/ Whereas the total number of claims can also be a factor in determining the sample size, when the population from which the sample is to be drawn is very large, its influence on the size of the sample is negligible. Accordingly, adding more claims to a sample that already adequately reflects the prominent proportion would neither improve the representativeness of the sample nor increase the accuracy of the extrapolation. Sample sizes thus did not increase proportionally with the total number of claims.

[31]/ Each claimant was requested on the category "A" claim form to indicate the evidentiary items that he or she attached to his or her form. For this purpose, the claimant could tick one or more of six boxes representing the following types of evidence: Copy of Official I.D. issued by Iraq or Kuwait, Used Tickets, Visa/Passport Stamp, Boarding Pass, Receipts/Bills, and Other. The claim form also requested claimants to attach a statement including the address of last residence and last place of work in Iraq or Kuwait, and to describe how they travelled from Iraq or Kuwait to their ultimate destination. Although the paper claim form did not provide a tick box for claimants to check whether they have included such a statement, the category "A" Data Capture System software (DCS) did. Thus, the distribution of evidence among the entire population of claims from each country or international organization can be determined from the category "A" claims database, i.e., the percentage of claimants who ticked Official I.D., Used Tickets, etc. The statisticians were asked to compile a sample that would reflect this distribution.

[32]/ When the percentage of a particular evidentiary item is close to either 0 or 100, the population may be considered to have a high level of homogeneity with respect to that evidence type. The highest degree of heterogeneity is present when the percentage for a particular type of evidence is close to 50. A standard statistical method is to base the sample size on the type of evidence presenting the highest degree of heterogeneity. In such cases, the sample would also account for the lack of homogeneity present in the other types of evidence. In the present context, for each country, the sample size was determined by examining the percentage of presented evidence for each type and selecting the percentage proportion closest to 50 - the prominent proportion - in order to maximize the likelihood that the sample would be representative of the population in respect of the distribution of evidentiary items.

[33]/ D. S. Moore and G.P. McCabe, Introduction to the Practice of Statistics (W.H. Freeman and Company, New York, 1989), p. 447.

[34]/ A variety of statistical formulae exist for the calculation of a sample size. The choice of the appropriate formula for a particular situation depends on the nature of the data available. Upon a careful examination of the computerized category "A" claims data, the following statistical formula, which is a standard formula [see, e.g., Moore and McCabe, op. cit., and William G. Cochran, Sampling Techniques, Third Edition (John Wiley & Sons, New York 1977)], has been used to calculate the sample sizes for the different countries and international organizations:

$$n = \frac{p(1-p)}{[\frac{(N-1)}{N}](\frac{d^2}{z^2}) + [\frac{p(1-p)}{N}]}$$

where n = sample size
p = prominent proportion
N = overall number of claims
d = margin of error
z = confidence level.

35/ See supra note 31.

36/ See Part IV. D. 3. of the first report.

37/ The way this works in practice is best illustrated through the study of an example:

(1) Sample size: 320
(2) Selective assessment:

Types of evidence		Percentage "Conclusive" per type
I.	Official I.D.	88%
II.	Used Tickets	-
III.	Visa/Passport Stamp	97%
IV.	Boarding Pass	100%
V.	Receipts/Bills	-
VI.	Other	96%
VII.	Statement	95%
VIII.	None	-

In the above example, 97 per cent of the sample claimants who actually attached "Visa/ Passport Stamps" had submitted evidence that was assessed to be "conclusive". The Panel would have found this percentage sufficiently high to hold that all "Visa/Passport Stamp" submitters were entitled to compensation; therefore all the claimants who were registered in the category "A" claims database as having submitted "Visa/ Passport Stamp" would have been recommended for payment of compensation. The Panel would have also come to the conclusion that the 96 per cent "conclusive" within the "Other" type, the 95 per cent "conclusive" within "Statement" and the 100 per cent "conclusive" within the "Boarding Pass" type were high enough to hold that all those who are registered as having these types of evidence in the database should be compensated. However, if the Panel determined that the 88 per cent "conclusive" within the "Official I.D." type was not sufficiently high, then the Panel would have held that those who ticked "Official I.D." in the database should not be awarded compensation based on that evidence alone. However, those who ticked "Official I.D." in combination with another type of evidence such as "Visa/ Passport Stamp", regarding which the "Percentage conclusive per type" was deemed sufficiently high by the Panel, would be eligible to receive compensation. In other words, the percentages of evidence found to be "conclusive" per type were not mutually exclusive. For example, of the 88 per cent of "Official I.D." submitters who were assessed "conclusive", many would have attached "Official I.D." as well as

"Visa/Passport Stamp", or "Official I.D." and "Other" and so on. Therefore, if all "Visa/ Passport" submitters were recommended to be eligible for compensation, these would have included many "Official I.D." submitters. Under this scenario, only those "Official I.D." submitters who did not submit any other type of evidence that would be deemed to be generally "conclusive" by the Panel would be subjected to further verification, i.e., their government would be asked to submit the paper forms of their claims and the evidence attached thereto. Furthermore, this particular sample did not have any claimants who attached "Used Tickets" or "Receipts/Bills". Such a situation occurred in a number of samples due to the fact that the samples selected were not intended to reflect types of evidence with negligible percentages in the overall population of claims. In the case of types of evidence not reflected in the sample, the Panel decided to ask the governments to send the paper claim forms, and attached evidence, of the claimants who are registered in the claims database as having only these types of evidence.

Annex III

Decision concerning the payment of parts one and two of the second instalment of claims for serious personal injury or death (category B claims) taken by the Governing Council of the United Nations Compensation Commission at its 55th meeting held on 11 October 1995 at Geneva*

The Governing Council

Decides, that the amount of US$8,252,500.00 be paid with respect to those awards as listed and as previously approved by the Governing Council in Decision 26 [S/AC.26/Dec.26 (1994)] and in Decision 27 [S/AC.26/Dec.27 (1995)].

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* Previously issued as document S/AC.26/Dec.32 (1995).